

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-2037

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT OF NEW YORK

HERBERT SPERLING,

PETITIONER-APPELLANT,

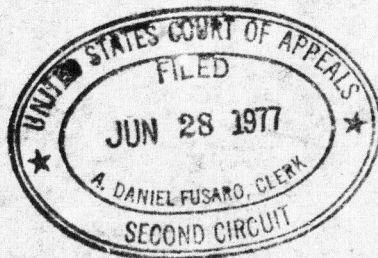
vs.

DOCKET No. 77-2037

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE.

PETITIONER-APPELLANT'S PRO SE
APPENDIX



PAGINATION AS IN ORIGINAL COPY

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DIST/OFFICE	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	O	R	23	OTHER	NUMBER	DEM.	YR.
203/76C		1991	10	01	76	2	510	APPEAL						

PLAINTIFFS

SPERLING, HERBERT

HERBERT SPERLING

DEFENDANTS

U.S.A.

UNITED STATES OF AMERICA

CAUSE

28 USC 2255 - motion to vacate or reduce sentence
RELATED CASE: 71 C 1241

ATTORNEYS

FOR PLNTFF:
HERBERT SPERLING/pro se
PO BOX PMB
#73271
Atlanta, Georgia 30315

☐ CHECK
HERE
IF CASE WAS

DATE

FILING FEES PAID

RECEIPT NUMBER

C.D. NUMBER

STATISTICAL C

CARD DATE

760

1001

SPERLING VS USA

DATE	NR	PROCEEDINGS
11-1-76		Motion to reduce or vacate sentence filed. (1)
12-7-76		BY PLATT, J. - order to show cause why the relief requested should not be granted filed. Copy of order and motion to vacate or reduce sentence mailed to the Atty/Gen. Copy of order mailed to petitioner. US (2)
12/23/76		By Platt, J. dtd 12/22/76 order extending time to file a return to the petition of Herbert Sperling for a period of 20 days from receipt of this order filed. (3)
1/18/77		GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION TO VACATE AND SET ASIDE CONVICTION, filed. (4)
2/7/77		By Platt, J Order was filed re resolution of the first issue makes it unnecessary for us to consider the petitioner's second argument. For the reasons, petitioner's application to vacate, correct, or set aside his 1971 guilty plea is denied. (5)
2/7/77		JUDGMENT filed dtd 2/7/77 that the petitioner take nothing of the respondent and that the motion is denied. (6)
2/11/77		Notice of motion for an order reconsidering and granting the petitioner motion under 2255 title 28 to vacate and set aside his plea of guilty and sentence under 71C 1241 etc. (7)
3-1-77		By PLATT, J-Supplemental memo & order dtd 2-28-77 that the Court on reconsideration of its decision, adheres to it filed. (8)
3-29-77		NOTICE OF APPEAL FILED. Copy to C of A. (9)
4-1-77		Civil appeal scheduling order ret 4-29-77 filed. (10)
4-1-77		Entire file certified and mailed to C of A. mg

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
HERBERT SPERLING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

-----x
To the Honorable United States District Court
For the Eastern District of New York:

The petition of HERBERT SPERLING, respectfully shows:

1. This petition is submitted in support of an application pursuant to 28 United States Code, Section 2255 to vacate a judgment of conviction and sentence entered thereon.
2. In June of 1959, I was indicted in the Eastern District on numerous counts under the Narcotics laws, 21 United States Code, Sections 173, 174.
3. A plea of guilty was entered before the Honorable Judge Zavatt on the 22nd day of September, 1959, to seven counts of indictment number Cr. 45869.
4. A few days prior to the entry of my plea of guilty, I was sentenced by the Honorable Alexander Bicks, in the Southern District of New York, as a youthful offender, pursuant to Title 18, United States Code, Section 5010 (b) and Title 18, Section 5017 (c).
5. My decision to plead guilty to the subject indictment in the Eastern District was induced by the fact that I was advised by my attorney, Robert Mitchell, that my sentence would run concurrently with the sentence imposed by Judge Bicks in the Southern District of New York. I was further informed that I would be extended the same treatment in the Eastern District, in view of the fact that the Districts were desirous of implementing a "uniform system of sentencing." (Affidavit of Robert Mitchell, Esq., attached hereto as Exhibit D)

710 1241

(Criminal Docket #45869/59)

CLERK
U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

SEP 22 12 03 PM '71

FILED

6. At the time of my plea of guilty, I was not informed by the Court that I would not be eligible for parole from my sentence due to Section 7237 (d) of the Internal Revenue Code, 26 United States Code, which makes narcotics offenders ineligible.

I have not attached a copy of the Minutes of the plea on September 22, 1959, as I have not yet received a copy. My attorney, Michael L. Santangelo, has requested a copy, by letter dated August 18, 1971 (attached as Exhibit II).

7. I was at that time and for sometime thereafter under the mistaken impression that parole would be available to me after serving one-third of my sentence, pursuant to 18 United States Code, Section 4202.

8. Thereafter, on February 19, 1960, I was sentenced to concurrent terms under seven counts of the indictment to a maximum term of ten years in prison by Judge Matthew T. Abruzzo.

9. At the time of sentencing my attorney, Robert Mitchell, expressed disappointment at my not having been treated as a youthful offender and discussed credit of time served under the prior sentence by Judge Bicks. Judge Abruzzo at that time referred Mr. Mitchell to the parole board for consideration of the question which colloquy further left me with the impression that I was subject to the normal parole provisions available to all defendants.

Never at any time did Mr. Mitchell visit me while I was incarcerated at the West Street House of Detention prior to my plea of guilty and sentence, nor did he speak with me subsequent to my sentence. The only consultation my attorney ever had with me was when I appeared before the Court at various stages of the proceeding.

10. I was unaware, at all stages of the proceedings against me, that if sentenced, I would be ineligible for parole under normal parole provisions.

11. At the time of the entry of my plea of guilty and sentence, I was nineteen (19) years of age and did not have any knowledge of my ineligibility, as a narcotic violator, under the normal parole procedures applicable to all prisoners. I remember my conversations with my attorney, Robert Mitchell, to the extent that I was left with the impression, prior to my plea and after, that my sentence would be one that would run concurrent with my youthful offender sentence. I was led to believe that I would be given the opportunity to serve my time as a youthful offender, which carried with it the promise of rehabilitative facilities and supervision.

I learned for the first time of my ineligibility for normal parole consideration while incarcerated at Lewisburg Federal Penitentiary. At that time, I did not feel that there was any hope of correcting the mistake I had made.

My disappointment and resentment at having had to serve the maximum term of my sentence was expressed by my refusal to sign the "conditions of release" upon my discharge from Lewisburg.

After learning of the Bye decision, I requested my attorney to make this application to this Court to correct the error of over ten years ago, when I was a youth of nineteen (19) years.

12. I am certain that if I had been advised of the severe penalty of ineligibility of parole, I would have requested a trial by jury on the question of my guilt or innocence. I did not feel at the time that I was guilty of the crimes alleged in the indictment or that the Government had sufficient evidence to support the facts alleged in the indictment returned against me.

13. At the present time, I am incarcerated at the West Street House of Detention in the City of New York.

14. The reason for my detention is an alleged violation of the conditions of parole pursuant to my sentence of the 19th day of February, 1960.

15. I have served 3174 days of my full ten year sentence (3651 days) and have now been committed to serve the remaining 393 days of my original ten year sentence.

16. The Warden of the West Street House of Detention has informed me that I will be sent to Lewisburg Federal Penitentiary within a week of the date of this petition.

17. In view of the fact that consultation with my attorney is vital to this proceeding, coupled with the fact that a hearing in this matter would require my presence in Court, I respectfully request that an order be issued restraining the Warden from transferring me to Lewisburg, pending the determination of this proceeding.

WHEREFORE, it is respectfully requested that this Court vacate the judgment of conviction and sentence entered thereon and/or in the alternative, order a hearing concerning the facts surrounding this proceeding; and it is further requested that this Court restrain the Warden and/or the Government from transferring me from the West Street House of Detention, pending the determination of this proceeding.

Herbert Sperling
(HERBERT SPERLING, Petitioner)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HERBERT SPERLING, being duly sworn, deposes
and says:

That deponent is petitioner in the within action; that deponent
has read the foregoing petition and knows the contents thereof; that the same
is true to deponent's own knowledge, except as to the matters therein stated
to be alleged on information and belief, and that as to those matters, deponent
believes it to be true.

Sworn to before me this
3 day of Sept, 1971.

Paul P. Spahr
Paul P. Spahr

Herbert Sperling
(HERBERT SPERLING)

"AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4904)".

NEW YORK COUNTY HQTRS.
NEW YORK CITY.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HERBERT SPERLING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

STATE OF NEW YORK)
) ss.:
COUNTY OF)

ROBERT MITCHELL, being duly sworn, deposes and says:

1. I am an attorney and member of the Bar of the State of New York and licensed to practice before the Federal District Court, Eastern District of New York.
2. This affidavit is submitted in support of the defendant's, SPERLING'S, application to vacate a conviction and sentence imposed therein in February, 1960.
3. In June of 1959, I was retained to represent HERBERT SPERLING in a pending criminal proceeding under Indictment No. 45869/59 in the Eastern District Federal Court, charging the defendant with violation of Section 173, 174 of Title 18 United States Code.
4. I have been requested to submit an affidavit, which would indicate or shed light on the knowledge of SPERLING with regard to his ineligibility for parole pursuant to Section 7237 (d) of the Internal Revenue Code prior to his plea of guilty to several counts under the indictment in question.
5. I do recall that my conferences with SPERLING were limited to my appearances in Federal Court at various times, when the case appeared on the Court calendar.
6. Prior to his plea of guilty to the instant indictment in the Eastern District, SPERLING received a sentence from the Honorable Alexander Weeks in the Southern District of New York, as a result of his plea of guilty

to being a Youthful Offender. My recollection at this time indicates that ineligibility for parole was not discussed with SPERLING.

7. SPERLING'S plea of guilty to the Eastern District Indictment occurred a few days after Judge Bick's sentence in the Southern District after which SPERLING was incarcerated at the West Street House of Detention. I did not visit SPERLING at any time prior to the appearance of September 22, 1959, in the Eastern District when SPERLING pleaded guilty to several counts of the indictment.

8. I recall indicating to SPERLING that I was of the opinion that his sentence in the Eastern District would run concurrent with the sentence in the Southern District. I indicated to SPERLING at the September 22, 1959 appearance that I would try to petition the Court to consider an application to treat him as a Youthful Offender. My advice to SPERLING was that the Federal Courts were engaged in a policy of a uniform system of sentencing which would cause the Judiciary to mete out sentences to defendants, such as SPERLING, equal to or comparable to sentences of Judges in other districts having access to the same probation reports and data concerning a defendant awaiting sentence.

9. I believe SPERLING changed his plea to guilty because of the mistaken impression that he would be treated as a Youthful Offender in the Eastern District. I do not recall ever telling him that his sentence, actually received, might far exceed the time he received in the Southern District, nor did I indicate to him that the conditions of parole would be substantially different.

10. Looking back I think that I was as disappointed as SPERLING was at the sentence of Judge Abruzzo (the attempt to treat SPERLING as a second offender was equally surprising to me. I think this might be the major reason

why the harsh terms of the actual sentence were never fully explored with SPERLING.

11. I have attempted to be as candid as possible, using my best recollection of this case, not having had the opportunity to read the Minutes of the plea entered before Judge Zavatt on the 22nd day of September, 1959.

12. I base the material portions of my recollection on the sentencing Minutes of the 19th day of February, 1960 and a sincere evaluation of the events which took place over ten years ago.

GEORGE L. SANFORD
NOTARY PUBLIC, State of New York
No. 20815936
Qualified in Westchester County
Commission Expires March 20, 1972

Robert Mitchell
(ROBERT MITCHELL)

Sworn to before me this
v / day of September, 1971.

George L. Sanford

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

HERBERT SPERLING,
Petitioner,

AFFIRMATION

v.

UNITED STATES OF AMERICA,
Respondent.

-----X

MICHAEL L. SANTANGELO, an attorney-at-law, duly admitted to practice in the Courts of the State of New York, affirms the following, under the penalties of perjury:

This affirmation is submitted at the request of the petitioner, Herbert Sperling.

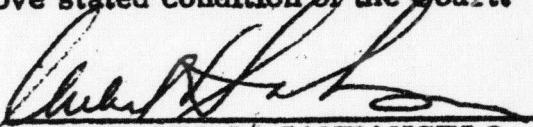
The petitioner has requested that affiant recall discussions and negotiations with the Court and Government at a time when affiant represented him pursuant to a motion to withdraw a plea of guilty on the grounds that Rule 11 of the Federal Rules of Criminal Procedure was not complied with at the time he entered a plea of guilty.

The motion was returnable before the Honorable Mark Costantino at which time counsel and the Court discussed the petitioner's request to withdraw his previously entered plea of guilty and thereby vacating his 10 year sentence.

To the best of my recollection (in the absence of the formal court stenographic record), the Court indicated to counsel that the conviction would not be set aside nor would the Court consent to a withdrawal of the plea of guilty unless the petitioner immediately thereafter enter a plea of guilty to the same crime to which he had previously pleaded guilty.

After informing petitioner of the Court's condition to the granting of his motion, the petitioner's original plea was set aside by the Court whereupon Sperling again pleaded guilty as per the above stated condition of the Court.

Dated: New York, New York
July 22, 1976


MICHAEL L. SANTANGELO

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
HERBERT SPERLING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.
-----x

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

* SEP 22 1971 *
TIME A.M. _____
P.M. _____

71C 1241

(Related Case

Cr -45869-59

- MEMORANDUM OF LAW -

SANTANGELO & SANTANGELO, ESQS.
Office & P. O. Address
253 Broadway Suite 320
New York, N. Y. 10007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
HERBERT SPERLING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.
-----X

- STATEMENT OF FACTS -

An indictment in the Eastern District was filed against HERBERT SPERLING on the 5th day of June, 1959, alleging under numerous counts violations of the Narcotics laws of the United States Government (Section 173, 174, Title 18 United States Code).

At the time of the indictment and entry of a plea of guilty on the 22nd day of September, 1959, SPERLING was 19 years of age. A few days earlier, on September 15, 1959, SPERLING was sentenced as a Youthful Offender by the Honorable Alexander Bicks, pursuant to Title 18 United States Code, Section 5010 (b) and Title 18 United States Code, Section 5017 (c).

At the time of the entry of the plea of guilty (before Judge Zavatt) in the Eastern District, SPERLING was not informed by the

Court that he would be ineligible for parole under the provisions of 26 United States Code Section 7237 (d) of the Internal Revenue Code.

At the time of sentence, on the 19th day of February, 1960, the Honorable Matthew T. Abruzzo sentenced SPERLING to a term of ten years. (The term being an accumulation of concurrent sentences metered out under seven counts of the indictment to which SPERLING pleaded guilty).

SPERLING alleges through his petition that

1. he was never informed of his ineligibility for parole by the Court or counsel;
2. he would not have pleaded guilty had he known of the harsh provisions of the ineligibility of parole vis a vis narcotic violators;
3. he was led to believe that the Eastern District would treat him in the same manner as he was in the Southern District because of a "uniform system of sentencing";
4. at the age of 19 SPERLING was left with the impression after sentence that the Parole Board had discretion regarding the

amount of time he would be incarcerated;

5. SPERLING would not have pleaded guilty had he been informed of his ineligibility. He would have submitted his guilt or innocence to a jury.

6. SPERLING'S affidavit is corroborated by his attorney, Robert Mitchell, which affidavit sets forth in detail the circumstances attendant to the petitioner's plea of guilty.

POINT I

SPERLING IS ENTITLED TO A
HEARING CONCERNING HIS
CLAIM THAT HE WAS UNAWARE
OF HIS INELIGIBILITY FOR
PAROLE.

Rule 11 of the Federal Rules of Criminal Procedure sets forth the command that a Court shall not accept a plea of guilty,

without first addressing the defendant personally and determining that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea.

In *Bye v. United States*, 435 F. 2d 176 (2d Circuit 1970) at page 179 the Court stated that

ineligibility for parole is indeed a consequence of the plea about which the defendant in narcotic cases must be informed under Rule 11.

In the *Bye* case, supra at page 179 the Second Circuit remanded the petition to the District Court for a hearing indicating that the hearing should be held "to determine whether Bye entered his plea voluntarily with an understanding that he would be ineligible for parole."

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Finally the Bye Court at page 182 indicated clearly that

since Bye's plea was accepted on November 29, 1966 prior to the Supreme Court's holding in McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166 (1969), (non-compliance with Rule 11 requires an automatic vacation of the guilty plea), the proper remedy in this case is to remand to the district court for a factual hearing on Bye's claim that at the time he pleaded guilty he was unaware of his ineligibility for parole.

POINT II

THE GOVERNMENT HAS THE
BURDEN OF PROVING THAT
SPERLING ENTERED HIS PLEA
VOLUNTARILY

In any event, since Bye has demonstrated a failure by the district court to comply with Rule 11, in not informing him of his ineligibility for parole, the Government must bear the burden of proving that his guilty plea was entered voluntarily with an understanding of the consequences of the plea.

Bye v. United States, supra at page 181.

It was further said the Bye case, supra at page 181 that

government arguments based on ...
the belatedness of the claim do not
satisfy its burden especially when
Bye has not been granted a hearing
on his allegations.

A careful reading of cases holding a contrary view, all of which were rendered prior to the Bye decision would indicate that petitioners in these cases fell short of the test enunciated in the Bye decision. In United States v. Caruso, 280 F. Supp. 371, aff'd. sub nom., United States v. Mauro, 399 F. 2d 158, (2d Circuit) a decision by the Honorable Judge Croake was affirmed by the Second Circuit Court of Appeals on the grounds that

1. Mauro knew full well that he was ineligible for parole.
2. His attorney's affidavit, indicated that, the attorney assumed Mauro knew of the ineligibility of parole.
3. Mauro was a person with an extensive criminal record.
4. Mauro's own admission of knowledge when he moved for a reduction of sentence.

It would appear that in all of those cases where hearings were denied a District Court Judge found that the petitioner knew of his ineligibility through evidence in the record or through statements of the petitioner's attorney.

In the instant case this determination would be difficult to make without the benefit of a hearing to determine the voluntariness of the plea, with the Government bearing the burden of coming forward with evidence of knowledge on the part of the petitioner.

The Bye Court at page 181 indicated in footnote 10 that

We do not read our holding in United States v. Mauro, supra, affirming United States v. Caruso as inconsistent with our view that the Government must bear the burden of proving that the plea was voluntarily entered ... when the accused was not informed by the Court of his ineligibility of parole.

Respectfully submitted,

SANTANGELO & SANTANGELO

MICHAEL L. SANTANGELO
Of Counsel

August 18, 1971

Eastern District-Court Reporters
United States Court House
225 Cadman Plaza East Room 374
Brooklyn, New York 11201

Re: U. S. A. v. Herbert Sperling
Criminal Docket #45869/1959

Gentlemen:

This office represents Herbert Sperling for the purpose of initiating a Section 2255 proceeding.

It is imperative, therefore, that we obtain a copy of the Minutes of an "acceptance of plea" taken by Judge Abbruzzo on the 22nd day of September, 1959 in the Eastern District Federal Court House.

Please notify this office regarding the availability of the Minutes and the time within which they will be ready.

Thank you for your cooperation herein.

Very truly yours,

MLS:dm

MICHAEL L. SANTANGELO

Exhibit II

Sworn to before me, this

day of

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HERBERT SPERLING,

PETITIONER,

-against-

UNITED STATES OF AMERICA,

RESPONDENT.

Civil No. _____

NOTICE OF MOTION TO VACATE AN
OLD JUDGMENT OF CONVICTION

SIRS:

PLEASE TAKE NOTICE, that upon the duly verified affidavit of the petitioner, HERBERT SPERLING, proceeding pro se, the motion and exhibits appended hereto and upon all the papers and proceedings had herein application will be made to Honorable Mark A. Costantino, at his chambers in the Federal Courthouse, Eastern District of New York, Brooklyn, New York State, at a time within the month of November, 1976, for an order directing that the old judgment of conviction (Indictment No. 59-45869) be declared a nullity of law and further ordered that said conviction be ordered expunged from the records of this Court, and/or that the petitioner be ordered down for a hearing in connection with the matter.

DATED: This 21 day of October, 1976.

Yours etc.,

Herbert Sperling

Herbert Sperling #78271
Petitioner, pro se
PO Box PMB
Atlanta, Georgia 30315

To: United States Attorney's Office
Eastern District Of New York
U.S. Federal Courthouse
Brooklyn, New York State 11201

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HERBERT SPERLING,

PETITIONER,

-against-

UNITED STATES OF AMERICA,

RESPONDENT.

Civil No. _____

PETITION FOR A MOTION TO VACATE
AND SET ASIDE AN OLD JUDGMENT OF
CONVICTION PURSUANT TO TITLE 28,
U.S.C., SECTION 2255, AND/OR THE
ALL WRIT SECTION OF TITLE 28,
U.S.C., SECTION 1651(a)

To: Honorable Mark A. Costantino, United States District
Judge, For The Eastern District Of New York.

The petition of HERBERT SPERLING, proceeding pro se, respectfully
shows to this Court and alleges:

1. That he is the petitioner in the above captioned matter; that he is presently incarcerated in the Atlanta Federal Penitentiary where by virtue of a prior conviction, had in this Court, he was sentenced as a second offender in the Southern District Of New York.
2. That the jurisdiction of this Court is invoked via Title 28, United States Code, Sections 2255 and 1651(a).
3. That he now makes the instant petition in support of his application for a Motion To Vacate and to declare as null and void and to expunge from the records of this Court a judgment of conviction entered against him on November 4, 1971, Honorable Mark A. Costantino, where upon his plea of guilty to Criminal Indictment No. 59-45869 he was sentenced to "time served plus four months," after successfully vacating a prior plea of guilty entered on September 22, 1959, before Judge Zavatt; sentence thereto occurred on February 19, 1960, before Judge Abruzzo, at which time the petitioner was sentenced to 10 years imprisonment for a violation of the narcotic laws.
4. That the petitioner has since served the totality of said sentence of "time served plus four months". (See copy of minutes of November 4, 1971, appended hereto).

5. That the instant prayer for relief is sought on the grounds that the petitioner's plea of guilty, in 1971, was obtained through fear, coercion, inducements, and promises/threats by the trial Court and was thus not a product of free will.

6. That the petitioner's first motion via Section 2255 sought vacature of the plea of guilty entered on September 22, 1959, because the trial judge (Zavatt, J.) neglected to inform him that he would not be eligible for parole on a conviction for narcotics. The petition argued that such a failure, on the part of the judge, failed to comply with the requirements of Rule 11, Federal Rules Of Criminal Procedure. A hearing was granted by this Court, however, said hearing was contingent upon the "condition" that the petitioner's "conviction would not be set aside nor would the Court consent to a withdrawal of the plea of guilty unless the petitioner immediately thereafter enter(ed) a plea of guilty to the same crime to which he had previously pleaded guilty." (See Affidavit Michael L. Santangelo, Esquire, appended hereto).

7. That in addition to the above the petitioner's attorney told him that he (Michael L. Santangelo) had entered into plea negotiations with this Court and that this Court had personally assured him (the attorney) that it would impose a sentence of time served immediately after the petitioner re-entered a plea of guilty. (See petitioner's Affidavit appended hereto).

8. That it was not until the actual day of the withdrawal of the original plea of guilty that the petitioner was told by his attorney that the Court had reconsidered its former promise of time served to include "time served plus four months." And that if the petitioner declined to accept these terms that the Court would "deny the motion to vacate the plea and let him (the petitioner) take it upstairs", and that by the time he obtained appellate review "he would have the four months in anyway." (Petitioner's Affidavit, p. 2). In fear of antagonizing this Court the petitioner succumbed to the pressure of the promises/threats, as delivered by his attorney and ostensibly emanating from the Court, and he entered an involuntary plea of guilty in violation of the fair play standards envisioned in the due process of law clause of the Fifth Amendment.

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9. That after vacating the first plea, and in accepting the subsequent plea of guilty, this Court failed to comply with the clear command of Rule 11, Federal Rules Of Criminal Procedure, insofar as the Court failed to establish a factual basis for the entry of the guilty plea nor did it ascertain that the petitioner was aware of the nature of the charges against him and/or that he had "an understanding of the nature of the charge" to which he was pleading guilty. The pleading minutes of November 4, 1971, clearly reflect that the Court, the prosecutor, nor defense counsel made any effort to apprise the petitioner of the underlying mechanics supporting/comprising the charges against him.

10. That the petitioner at no time ever waived his right to procedural due process of law.

11. That no previous application has ever been made seeking the specific relief herein sought.

WHEREFORE, the petitioner respectfully prays that this Court cause to issue an order declaring as void and expunging from the records the conviction herein attacked, and/or that it direct that a hearing be had to inquire into the facts of the matter alleged in this petition and that the petitioner have such further and other relief as justice may require.

DATED: October 26, 1976.

Respectfully submitted,

Herbert Sperling

Herbert Sperling #78271
Petitioner, pro se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HERBERT SPERLING,

PETITIONER,

-against-

Civil NO. _____

UNITED STATES OF AMERICA,

RESPONDENT.

PETITIONER'S PRO SE MEMORANDUM
OF LAW

On September 22, 1959, the petitioner entered a plea of guilty under Criminal Indictment No. 59-45869, before Judge Zavatt, and he was sentenced on February 19, 1960, to ten (10) years imprisonment by Judge Abruzzo. The indictment was for a violation of the narcotic laws.

On November 4, 1971, Honorable Mark A. Costantino, granted the petitioner's motion to vacate and set aside the plea of guilty and sentence thereto. On the same date the Court sentenced the petitioner to "time served plus four months", upon a re-entry of a plea of guilty.

The petitioner now moves via 28 U.S.C., Sec's. 2255 and 1651(a) for the vacature and expungement of said conviction on the grounds that the Court coerced the petitioner into entering a plea of guilty through a process of fear and intimidation and that it failed to comply with the requirements of Rule 11 of the Federal Rules of Criminal Procedure.

1. It Is Axiomatic That A Psychologically Extracted Plea Of Guilty Is, Per Se, Involuntary, As A Result It Cannot Remain Harmonious With The Due Process Clause Of The Fifth Amendment.

This is an appositive although not altogether neological problem concerning basic constitutional violations which are generated when a plea of guilty is obtained through a psychological process of fear, threats, and inducements by a trial court. In particular, it involves the mental impact or effect that such an atmospheric spectrum had on the petitioner's will; and whether he freely and intelligently waived his constitutional rights to:

(1) Trial by jury (United States V. Tateo, 377 U.S. 463, 12 L.Ed.2d 448, 84 S.Ct. 1587 (1964), dissenting opinion per Goldberg, J.); and (2) self-incrimination (Malloy V. Hogan, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964)). Thus this unquestionably becomes a modern day issue of first impression concerning the gravamen of fundamental violations.

It is a well established principle of law that a plea of guilty obtained through fear or psychological coercion etc., violates the due process clause of the Fifth Amendment. A plea of guilty is a confession of the facts alleged in the indictment; therefore, there is no reason to believe that what is required of police officers should be less in a court of law. (See e.g., Haynes V. Washington, 373 U.S. 503, 10 L.Ed.2d 513, 83 S.Ct. 1336 (1963), induced to confess under promise to call wife; and Lynum V. Illinois, 372 U.S. 528 (1963), induced to confess under threat that children would be placed in a home). Of major significance is the dissenting opinion of then circuit Judge Marshall in McGrath V. LaVallee, 319 F.2d 308 (2nd Cir. 1963):

"Our concept of due process must draw a distinct line between, on the one hand, advice from and 'bargaining' between defense and prosecuting attorneys and, on the other hand, discussions by judge's who are ultimately to determine the length of sentence to be imposed."

This line of reasoning found vitality in Judge Weinfeld's opinion in Elksnis V. Gilligan (256 F.Supp. 244 (1966)):

"The judge stands as the symbol of evenhanded justice, and none can seriously question that if this central figure in the administration of justice promises an accused that upon a plea of guilty a fixed sentence will follow, his commitment will have an all pervasive and compelling influence in inducing the accused to yield his right to trial. A plea entered upon a bargain agreement between a judge and an accused cannot be squared with due process requirements....."

Happily, the Second Circuit seems to have disinterred the corpse of then Judge Marshall's dissenting opinion, in McGrath, supra, and breathed new life into its etheric body:

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"The primary concern of those who would disassociate the judge from the plea bargaining process has been that judicial intervention may coerce the defendant into an involuntary plea.....The defendant may fear that rejection of the plea will mean imposition of a more severe sentence after trial or decrease his chances of obtaining a fair trial before a judge whom he has challenged..... quite apart from the sentencing process, the defendant may in fact be prejudiced if he does not plead guilty in response to the judge's proposed

"sentence. The defendant must view the judge as the individual who conducts the trial and whose rulings will effect what the jury is to consider in determining guilt or innocence. The defendant may therefore be reluctant to reject a proposition offered by one who wields such immediate power. Regardless of the judge's objectivity, it is the defendant's perception of the judge that will determine whether the defendant will feel coerced to enter a plea." (United States V. Werker, ____ F.2d ____, 19 CrL 2226, 2227 (2nd Cir. 1976))

The minutes of pleading and sentence clearly reflect that "the Court would vacate that plea (the original one) on condition" and specifically asked the petitioner if he was "ready to accept that condition". (Pleading and sentencing minutes, at pp. 5-6). Hence, it is clear that the petitioner's plea of guilty was not a product of free will but, in truth, the by-product of judicial overreaching.

ii. Failure To Comply With The Requirements Of Rule 11, Federal Rules Of Criminal Procedure, Mandates Vacature Of The Plea Of Guilty.

Rule 11, F.R.C.P., which governs entry of guilty pleas in the federal district courts was adopted in 1944. Since then Rule 11 has been amended on three different occasions, i.e., in 1957, 1966, and 1975. However, Rule 11's central theme that a defendant must have an understanding of the nature of the charge against him and that the court must ascertain this before accepting a guilty plea remains unaltered and viable.

In the case at bar we are solely concerned with Rule 11 as it existed at the time that the petitioner entered his plea of guilty on November 4, 1971. At that time Rule 11 read as follows:

"A defendant may plead not guilty, guilty or with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

In McCarthy V. United States (394 U.S. 460, 22 L.Ed.2d 418, 89 S.Ct. 1166 (1969)), the Supreme Court held that failure to comply with Rule 11's provision that the Court personally address the defendant required that the defendant be given leave to plead anew. Halliday V. United States (394 U.S. 831, 23 L.Ed.2d 16, 89 S.Ct. 1498 (1969)), held that McCarthy's rule would be given prospective application. Thus where a guilty plea is entered after

May 5, 1969 the record must demonstrate that the court has personally addressed the defendant concerning his understanding of the charges against him (see United States V. Cody, 438 F.2d 287 (8th Cir. 1971) Lawyer's discussion of indictment with defendant does not show that defendant understood the charges) and the consequences of the plea must be explained by the court(Bye V. United States, 435 F.2d 177 (2nd Cir. 1970)), unavailability of parole is a consequence of a plea; United States V. Richardson, 483 F.2d 516 (8th Cir. 1973) knowledge of special parole term necessary ingredient to a guilty plea; Jones V. United States, 440 F.2d 466 (2nd Cir. 1971) maximum possible sentence is a consequence of a plea). In addition, a factual basis for a plea must be shown; though this need not be established by the defendant's own admission. (See North Carolina V. Alford, 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160 (1970); and United States V. Frontero, 452 F.2d 406 (5th Cir. 1971)).

Be that as it may, the pleading/sentencing minutes of the instant case reveal that the Court did not inquire of the petitioner whether he understood the nature of the charge against him or whether he had read or had read to him the allegations of the indictment. The indictment contained approximately seventeen (17) counts, nowhere does it reflect to what counts the plea was entered under nor does it reflect that the counts were read and explained to the defendant-petitioner.

In United States V. Lester, (247 F.2d 496, 499-500 (2nd Cir. 1957))

The Court held that the district judge had not fulfilled his obligation under Rule 11 in accepting a 1954 plea where the inquiry was far more extensive than in the case at bar since the defendant was asked if he understood the charge:

"Rule 11 of the Federal Rules of Criminal Procedure, 18 U.S.C. provides that the court 'shall not accept the plea (of guilty) without first determining that the plea is made voluntarily with understanding of the nature of the charge'. While such a determination does not require observance of a particular ritual (cit. omitted) the Rule clearly contemplates that there be something more than a perfunctory examination conducted by the prosecutor that does not serve to inform the judge of the extent of the prisoner's knowledge of the consequences of a guilty plea. A mere routine inquiry--the asking of several standard questions--will not suffice to discharge the duty of the trial court. It is the duty of a trial judge before accepting a plea of guilty to thoroughly investigate the circumstances under which it is made."

When the record, as here, demonstrates non-compliance with Rule 11 the government, not the petitioner, bears the ultimate burden of persuasion

that the requirements of due process were met.

In Rimanich V. United States (357 F.2d 537 (5th Cir. 1966)) the appellate court held:

"The burden of proof is normally on a §2255 petitioner to prove his allegations, and the district judge in the proceeding below followed this usual rule. When it is shown, however, that the trial court did not comply with the provisions of Rule 11 of the Federal Rules of Criminal Procedure, requiring that '(t)he court...shall not accept the (guilty) plea without first determining that the plea is made voluntarily with understanding of the nature of the charge,' the burden of proof shifts to the government on the question of the voluntariness of the guilty plea."

Rimanich was cited with approval in Halliday V. United States, (380 F.2d 270 (1st Cir. 1967)) after remand (394 F.2d 140 (1st Cir. 1968) aff'd 394 U.S. 831, 832 (1969)):

"The United States Court of Appeals for the First Circuit affirmed per curiam. Although it acknowledged that the District Court had not complied with Rule 11 when it accepted petitioner's plea, it held that he was not entitled to relief because 'ample evidence' supported the District Court's findings that the Government had met its burden of demonstrating that petitioner entered his plea voluntarily with an understanding of the nature of the charges against him."

In Domenica V. United States (292 F.2d 483 (1st Cir. 1961)) the

court said:

"However, if the transcript was correctly set forth in the petition, lack of compliance with Rule 11 is established. Nonetheless, if the plea was in fact voluntary, the error was harmless. On this issue the burden will be on the government."

As to harmless error, in Munich V. United States (337 F.2d 356, 360 (9th Cir. 1964)) the court had this to say:

"But where there has been noncompliance with Rule 11, the Government has the burden of proving that the error was harmless, i.e., that the defendant made his plea of guilty voluntarily and with understanding of the nature of the charge."

Before leaving the district court Judge Mansfield, in Banks V. United States (319 F.Supp. 649, 652 (S.D.N.Y. 1970)), held that where the record shows non-compliance with Rule 11, the government bears the ultimate burden of persuasion that the plea was knowingly and understandingly entered:

"In view of the court's failure to make the determination commanded by Rule 11 as it was phrased in 1957, petitioner is entitled to a hearing to determine whether the defendant acted voluntarily and understood the charges to which he pleaded guilty. (cit. omitted) Should the government fail to sustain its burden of proving voluntariness and understanding--and we note that both petitioner's

"counsel and Judge Noonan are deceased--petitioner must be afforded the opportunity to plead anew."

Only recently the Supreme Court had the opportunity to speak in a case with a fact pattern remarkably similar to the petitioner's. The Supreme Court held that where a defendant

"...did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment of conviction was entered without due process of law." (Henderson V. Morgan, ___ U.S. ___, 19 CrL 3133, 3135 (June 17, 1976))

CONCLUSION

For the foregoing reasons the petitioner's conviction upon his plea of guilty violated due process of law standards and Rule 11 of the Federal Rules Of Criminal Procedure, and the petitioner's pro se motion should be granted.

DATED: October 26, 1976.

Respectfully Submitted,

Herbert Sperling

Herbert Sperling
Petitioner, pro se
PO Box PMB #73271
Atlanta, Georgia 30315

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HERBERT SPERLING,
PETITIONER,
-against-
UNITED STATES OF AMERICA,
RESPONDENT.

Civil No. _____

PROOF OF SERVICE

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

HERBERT SPERLING, after being duly by law sworn, deposes and says:
that on this 26 day of October, 1976, he placed the original Notice Of Motion
To Vacate An Old Judgment Of Conviction, the petition thereto, along with the
petitioner's Memorandum Of Law, Affidavit Of Michael Santangelo, Affidavit Of
The Petitioner, and a copy of the relevant transcript upon the Parole Officer
named below, together with copies of the above mentioned documents, for the
purpose of mailing same to the petitioner's mother, Mrs. Cecile Sperling, so
that the latter may hand deliver same to the Clerk of this Court along with
the filing fee thereto. All of which should constitute sufficient proof of
service.

Yours etc.,

Herbert Sperling
Herbert Sperling #78271
Petitioner, pro se

Sworn to before me this
26 day of October, 1976.

Charles C. Minter

Parole Officer - Charles C. Minter
10/27/76 - 10/27/76
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HERBERT SPERLING,
PETITIONER,
-against-
UNITED STATES OF AMERICA,
RESPONDENT.

Civil No. _____

AFFIDAVIT

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

HERBERT SPERLING, after being duly by law sworn, deposes and says:
that he is the petitioner/affiant herein, and that he makes the instant
affidavit in support of his motion herein.

1. That on September 22, 1959, the affiant entered a plea of
guilty to Counts One, Two, Three, Four, Five, Six and Seventeen under Crim-
inal Indictment No. 59-45869, before Judge Zavatt, and sentence thereto was
imposed by Judge Abruzzo, on February 19, 1960, of ten years imprisonment.

2. That on November 4, 1971, Honorable Mark A. Costantino, vacated
said plea pursuant to a §2255 motion attacking the validity of the plea of
guilty insofar as the court (Zavatt, J.) had failed to apprise the affiant
that he would not be eligible for parole as a result of his conviction for
violating the narcotic laws.

3. That prior to this Court vacating the plea of guilty the
affiant's attorney, Michael Santangelo, told the affiant that he (Santangelo)
had spoken with the Court and that the Court had agreed to vacate the plea
entered in 1959 if the affiant would agree to immediately thereafter enter
a new plea of guilty and accept a time served. The affiant agreed.

4. That on November 4, 1971, before the case was called the
affiant's attorney told him that the Court had decided that it could not
impose a sentence of time served but that it would impose a sentence of

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"time served plus four months." And that if the affiant did not agree to these conditions the Court would deny the 83255 motion even though the affiant was legally right and that by the time an appeal was taken and heard from the denial the affiant would have the four months in anyway.

5. That the affiant was afraid to antagonize the Court and against his will he succumbed to the coercion of the Court by entering an involuntary plea of guilty.

6. That the pleading/sentencing minutes fail to reflect with any degree of particularity the counts under which the November 4, 1971, plea of guilty was entered nor do they reflect the basis for said plea.

7. That the affiant, HERBERT SPERLING, has read the instant affidavit and knows the contents thereof, that the same is true to his own knowledge and belief except as to those matters therein based on information and belief, and as to those matters he believes them to be true.

Yours etc.,

Herbert Sperling
Herbert Sperling #78271

Sworn to before me this

26 day of October, 1976.

Charles E. Moore

Parole Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

-versus- :

71-C-1241

HERBERT SPERLING, :

Defendant. :

-----X

United States Courthouse
Brooklyn, New York

November 4, 1971
4:15 o'clock p.m.

B e f o r e :

HONORABLE MARK A. COSTANTINO, U.S.D.J.

EMANUEL A. KARR
OFFICIAL COURT REPORTER

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Appearances:

ROBERT A. MORSE, ESQ.,
United States Attorney for the
Eastern District of New York

BY: HAROLD FRIEDMAN, ESQ.,
Assistant United States Attorney

MICHAEL L. SANTANGELO, ESQ.,
Attorney for the Defendant

- - - -

EK:jm

1 THE CLERK: Herbert Sperling versus United
2 States of America.

3 MR. SANTANGELO: Judge, I have, in the
4 sentencing minutes of Judge Abruzzo, an indication
5 that he was found guilty on the 22nd of September
6 before Judge Zavatt, and it indicates a plea of
7 guilty to Counts Three, Six and Seventeen.

8 THE COURT: No.

9 MR. SANTANGELO: That may be in error, but --

10 THE COURT: That is in error because the
11 sheet itself, which is signed by the Judge, indicates
12 the counts which he pleaded to.

13 MR. SANTANGELO: That would be One, Two, Three
14 Four, Five, Six and Seventeen.

15 THE COURT: Yes, One, Two, Three, Four, Five,
16 Six and Seventeen, each one having to do with the
17 possession of narcotics, which he attempted to
18 unlawfully sell.

19 MR. SANTANGELO: Your Honor, the defendant
20 has made application in this case pursuant to
21 Section 2255 to set aside and vacate the plea of
22 guilty and conviction dated back to the plea in
23 October of 1959 in the Eastern District under
24 indictment -- criminal number 45869, which plea was
25 entered before Judge Zavatt in the Eastern District

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1 and the defendant pleaded guilty to the indictment.

2 THE COURT: To all the counts in which he
3 was mentioned, in the seventeen count indictment
4 consisting of One, Two, Three, Four, Five, Six and
5 Seventeen.

6 MR. SANTANGELO: That is correct, your Honor.

7 THE COURT: All right.

8 MR. SANTANGELO: Now, this proceeding is a
9 Section 2255 proceeding and was brought on by the
10 defendant, and his grounds for vacating this
11 conviction and plea of guilty were the following:

12 That at the entry of the plea of guilty
13 before Judge Zavatt the defendant was never informed
14 of his ineligibility for parole by the Court or
15 counsel, and the defendant contends by affidavit
16 submitted to this Court that he would not have
17 pleaded guilty had he known of the harsh provisions
18 of the eligibility of parole in respect to narcotic
19 violations. He pleaded guilty to 173, 174 of
20 Title 18, United States Code, and in view of that
21 fact, the defendant's plea was therefore involuntary
22 and the defendant therefore moves to set aside the
23 plea of guilty and conviction pursuant to that plea
24 in February, February 19, 1960, where Judge Abruzzo
25 sentenced this defendant to a period of ten years on

1 all counts of the indictment.

2 THE COURT: All right.

3 Do you understand what your lawyer has just
4 said?

5 THE DEFENDANT: Yes.

6 THE COURT: He said that you pleaded at the
7 time involuntarily because you claim that you were
8 never advised of your ineligibility for parole under
9 the indictments placed against you.

10 THE DEFENDANT: Yes, sir.

11 THE COURT: All right.

12 You are now asking this Court to vacate that
13 plea?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And to vacate the sentence, the
16 original sentence which was imposed upon you?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Has your lawyer had a conversation
19 with you?

20 THE DEFENDANT: Yes.

21 THE COURT: Has your lawyer conferred with
22 you as to the conversation that he had together
23 with the Judge and the United States Attorney?

24 THE DEFENDANT: Yes.

25 THE COURT: And in view of that conversation,

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1 did your lawyer tell you that the Court would vacate
2 that plea on condition?

3 THE DEFENDANT: Yes.

4 THE COURT: Are you ready to accept that
5 condition?

6 THE DEFENDANT: Yes.

7 THE COURT: Then this Court hereby vacates
8 the sentence and also vacates the plea of guilty on
9 the basis that at the time this defendant wasn't
10 advised of his ineligibility as to parole.

11 Now, we still have the same counts, one, two,
12 three, four, five, six and seventeen. Are you now
13 ready to plead to those same counts?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right.

16 Now, you do so plead?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: You plead guilty to them?

19 THE DEFENDANT: Yes.

20 THE COURT: Do you understand, of course, by
21 pleading guilty -- and you must listen to what I am
22 going to tell you now -- do you understand by
23 pleading guilty that you are waiving a Constitutional
24 right to a jury trial?

25 THE DEFENDANT: Yes.

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1 THE COURT: Now, you understand that you have
2 the right to have witnesses called who would testify
3 against you, confront you? And you, in turn, to
4 call witnesses on your behalf?

5 THE DEFENDANT: Yes.

6 THE COURT: You also have the right to stand
7 mute.

8 Has anyone forced you into taking this plea?

9 THE DEFENDANT: No.

10 THE COURT: That is other than the conditions
11 that the Court has discussed with your lawyer.

12 THE DEFENDANT: No.

13 THE COURT: And you are doing it voluntarily,
14 with full knowledge of what is happening?

15 THE DEFENDANT: Yes.

16 THE COURT: By the way, do you also waive any
17 further Probation report as far as you are concerned
18 at this time?

19 THE DEFENDANT: Yes.

20 THE COURT: Do you understand now by pleading
21 guilty to this under the original law and also as
22 to today, you would not be eligible for parole?

23 THE DEFENDANT: Yes.

24 THE COURT: You were so advised?

25 THE DEFENDANT: Yes.

1 THE COURT: Now, is this Court also to
2 understand that in your previous plea of guilty you
3 were sentenced and you have served an X amount of
4 time in jail, something like nine years or so?

5 THE DEFENDANT: Yes.

6 THE COURT: Now, will you tell me in your own
7 words what you are pleading guilty to?

8 THE DEFENDANT: I am pleading guilty to the
9 counts of the indictment.

10 THE COURT: Those counts involve certain
11 things, and would you give me some idea of what you
12 say you did pursuant to these said counts?

13 THE DEFENDANT: Conspiracy and sales to
14 violate the narcotic laws.

15 THE COURT: What kind of a narcotic was it,
16 do you remember?

17 THE DEFENDANT: No.

18 THE COURT: You don't remember what kind of a
19 narcotic it was?

20 THE DEFENDANT: No.

21 THE COURT: Well, was it heroin?

22 THE DEFENDANT: If that is what the indictment
23 said, yes.

24 THE COURT: That is what it was?

25 THE DEFENDANT: That is what it was.

1 THE COURT: Now, you understand likewise by
2 this plea that all of the Constitutional rights that
3 you have you have now waived?

4 THE DEFENDANT: Yes.

5 THE COURT: And that the plea you have now
6 made is completely voluntary on your part?

7 THE DEFENDANT: Yes.

8 THE COURT: And that you are now ready for
9 sentence?

10 THE DEFENDANT: Yes.

11 THE COURT: Are you ready for sentence?

12 MR. SANTANGELO: Yes, the defendant is ready
13 for sentence.

14 THE COURT: Do you wish to make a statement?

15 MR. SANTANGELO: Yes, your Honor.

16 I'm sure, Judge, that you are aware of the
17 fact that this defendant has spent quite some time
18 incarcerated under the original indictment and
19 original plea back in October 1959. I'm not sure of
20 the exact amount of time, but it hovers around the
21 nine-year period of time. This defendant was
22 sentenced to ten years and served this nine years
23 actually incarcerated. As a result of being
24 released in September of 1966 and subsequent parole
25 violations which refer to the old charge, that charge

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1 which has been vacated by this Court, I now ask the
2 Court to take into consideration the fact that the
3 defendant has spent that amount of time in jail in
4 sentencing the defendant and also the fact that the
5 defendant since that time, since his release from
6 prison some months ago, has recently been married
7 and his wife has two children and she is in court
8 today, and I ask you to be as lenient as possible
9 under the circumstances, in view of the defendant's
10 re-plea.

11 THE COURT: All right. Of course you know
12 that this Court has discussed again the question of
13 sentence with the United States Attorney and with
14 your attorney. Of course, the United States Attorney
15 takes no part in the discussion with the Court in
16 deciding on sentence.

17 As far as taking a plea to all counts of the
18 indictment, you have no objection to that?

19 MR. FRIEDMAN: No, if your Honor has none.

20 THE COURT: He has pleaded to the full
21 indictment.

22 MR. FRIEDMAN: Your Honor has accepted this
23 plea.

24 THE COURT: I accepted the plea, I'm now
25 ready, after discussing this with your lawyer, and

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1 this Court having come to the conclusion that you
2 have served a major part of the time pursuant to
3 the original sentence to which you pleaded guilty,
4 the time served plus four months, and as to the
5 amount of time that you have served, this shall be
6 determined by the prison where you will be sent, so
7 that your time served plus four months --

8 MR. SANTANGELO: In other words, the time
9 served, whatever time that is --

10 THE COURT: Plus four months.

11 MR. SANTANGELO: Plus four months will be his
12 sentence.

13 THE COURT: That is his sentence.

14 MR. SANTANGELO: Thank you very much, Judge.

15 THE DEFENDANT: Thank you.

16 MR. SANTANGELO: Judge, one more request.

17 THE COURT: What is that?

18 MR. SANTANGELO: His wife is in court.

19 THE COURT: Yes, he may talk with her.

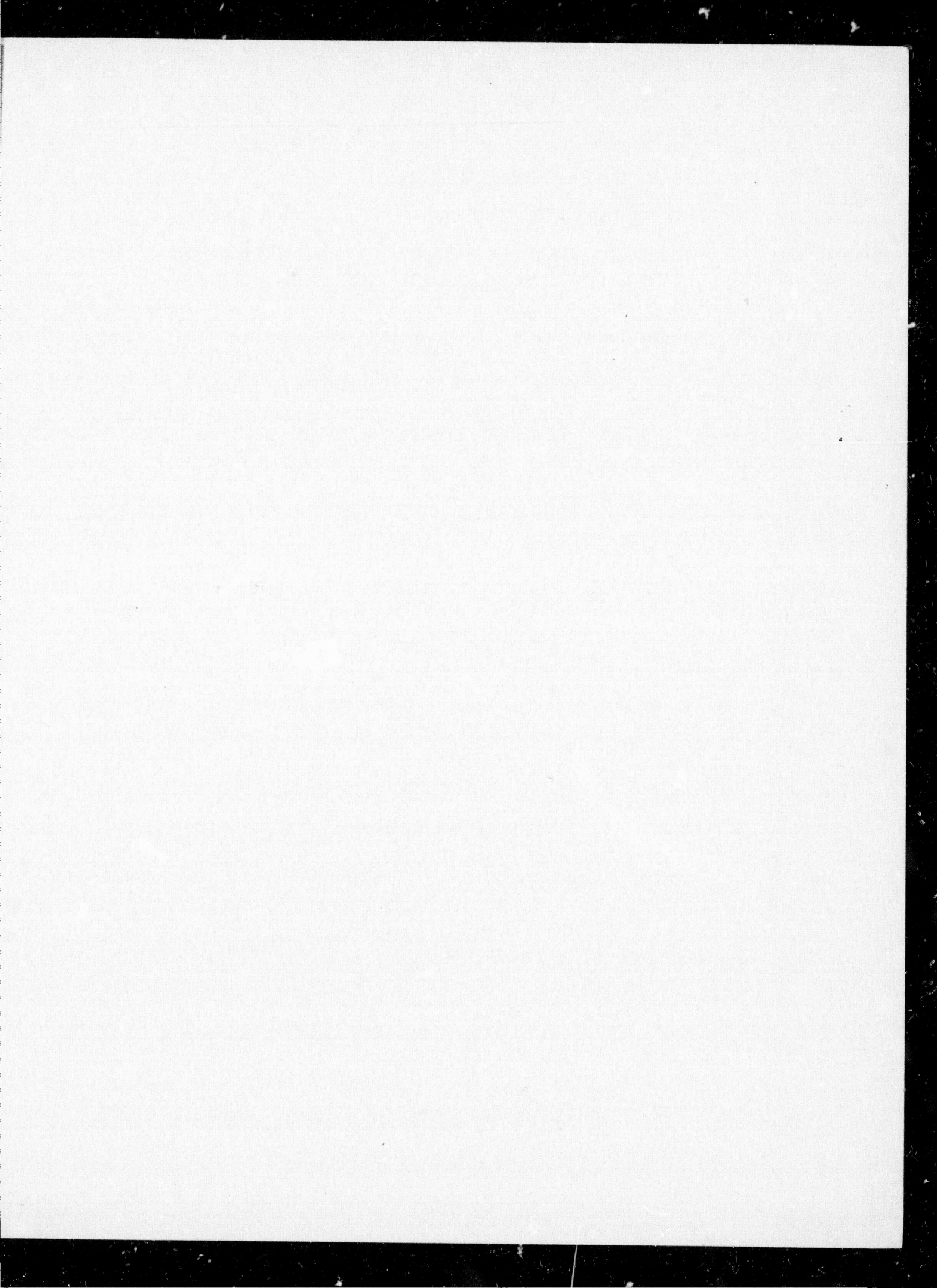
20 Let me ask you, do you waive probation?

21 THE DEFENDANT: Yes.

22 THE COURT: All right, all right.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HERBERT SPERLING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

DEC 7 1976

No. 76 C 1991

ORDER TO
SHOW CAUSE

Upon the petition for relief under 28 U.S.C. §2255 dated October 26, 1976, a copy of which is attached, it is ORDERED that:

(1) The United States Attorney for the Eastern District of New York show cause before this Court why the relief requested should not be granted, by the filing of a return to the petition;

(2) Within twenty (20) days of receipt of this order the United States Attorney shall serve a copy of his return on the petitioner herein and file the original thereof, with proof of such service, with the Clerk of this Court;

(3) If the transcript of the trial be available, the United States Attorney is directed to submit such transcript and record to this Court at the time of the filing of such return;

(4) Petitioner, within ten (10) days of the receipt by him of a copy of the return of the United States Attorney, shall file his reply, if any, in duplicate, with the Clerk of this Court;

(5) Service of a copy of this order shall be made by the Clerk of this Court by delivery of a copy thereof, together with a copy of the petition, to the United States Attorney, and by mailing a copy of this order to the petitioner.

Thomas C. Clitt

U. S. D. J.

Dated: Brooklyn, New York
December 6, 1976

*Clitt for
P. B. 177
W. J. and
D. J.*

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(2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
HERBERT SPERLING,

Petitioner,

AFFIDAVIT

76 C 1991

- against -

UNITED STATES OF AMERICA,

Respondent.
----- X

MARILYN GAINNEY, Assistant United States Attorney
for the Eastern District of New York, deposes and says
that:

1. On December 8, 1976 she received an Order
to Show Cause in connection with the above-captioned
petition.

2. She has been assigned to respond to said
petition within twenty (20) days of the receipt of said
Order.

3. In order to intelligently respond to the
petition it is necessary to obtain the transcripts and
records of the 1971 and 1959 proceedings involving the
petitioner.

4. To date she has been unable to obtain
said records and is making a continued effort to do so.

WHEREFORE, your deponent respectfully requests
an additional twenty day period in which to file a return
to said petition.

I declare under penalty of perjury that the
foregoing is true and correct.

MARILYN GAINNEY
Assistant U.S. Attorney

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PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

United States Attorney,
Attorney for _____

To:

Attorney for

PLEASE TAKE NOTICE that the within
is a true copy of _____ duly entered
herein on the ____ day of _____
_____, in the office of the Clerk of
the U. S. District Court for the Eastern Dis-
trict of New York.

Dated: Brooklyn, New York,

United States Attorney,
Attorney for _____

To:

Attorney for

UNITED STATES DISTRICT COURT
Eastern District of New York

HERBERT SPERLING,
Petitioner.

—Against—

UNITED STATES OF AMERICA

Respondent.

ORDER, MOTION & AFFIDAVIT

DAVID G. TRAGER

United States Attorney,
Attorney for U.S.O.P. AMERICA
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
 .. is hereby admitted.

Dated: _____, 19

Attorney for

M. GAINES PI-LC-5M-8-73-7355

AUSA 330-7051

DAD:MG:bj
F# 762,534

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

HERBERT SPERLING,

76 C 1991

Petitioner,

-against-

UNITED STATES OF AMERICA,

MOTION TO EXTEND
TIME TO FILE A
RETURN TO THE
PETITION OF HERBERT
SPERLING

Respondent.

----- X

The UNITED STATES ATTORNEY by MARILYN GAINNEY,
Assistant United States Attorney, Eastern District of
New York, hereby moves this Court for an order extending
the time in which a return to the petition of HERBERT
SPERLING should be filed for a period of twenty (20)
days. In support hereto the annexed affidavit is
respectfully submitted.

DAVID G. TRAGER
United States Attorney
Eastern District of New York

Marilyn Gainney
MARILYN GAINNEY
Assistant U.S. Attorney

DAD:MG:bj
F# 762,534

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
HERBERT SPERLING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.
----- X

76 C 1991

ORDER EXTENDING TIME
TO FILE A RETURN TO
TO THE PETITION OF
HERBERT SPERLING

The UNITED STATES ATTORNEY having moved for an Order extending the time to file a return to the petition of HERBERT SPERLING for a period of twenty days and having shown by affidavit made by MARILYN GAINES the reasons for such extension.

Now therefore, the Court having determined good cause shown for the extension of the time period, it is

ORDERED that the time for the United States Attorney for the Eastern District of New York to file a return to the petition of HERBERT SPERLING be extended for a period of twenty days from the receipt of this order.

Thomas C. Platt

THOMAS C. PLATT
United States District Judge
Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

HERBERT SPERLING

Petitioner

76 C 1991

-against-

UNITED STATES OF AMERICA,

Respondent.

----- X

GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO PETITIONER'S
MOTION TO VACATE AND SET ASIDE
CONVICTION

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Marilyn Gainey
Assistant U.S. Attorney
(Of Counsel)

PRELIMINARY STATEMENT

In June, 1959 the petitioner, Herbert Sperling, was indicted under criminal indictment No. 45869/59 for violations of the Federal narcotics laws pursuant to Title 21, United States Code, Sections 173, 174. On September 22, 1959 petitioner pleaded guilty to these charges before the Honorable Joseph C. Zavatt, ^{1/} and on February 19, 1960, petitioner was sentenced to a term of ten years imprisonment by the Honorable Matthew T. Abruzzo.

On September 3, 1971 petitioner moved the Court to vacate the 1959 conviction and sentence alleging that at the time of his plea on September 22, 1959 he was not informed of his ineligibility for parole under the then extant Federal narcotics laws. ^{2/} On November 4, 1971 the Honorable Mark A. Costantino vacated petitioner's 1959 conviction and sentence, and on that same date petitioner entered a new plea of guilty to the same charges to which he had originally pleaded guilty on September 22, 1959. Judge Costantino sentenced petitioner to a period of "time served plus four months". ^{3/}

^{1/} The Government attempted to obtain a copy of these 1959 plea minutes, but we were informed by Evelyn Cohen, Administrative Assistant of the Court Reporter's staff that these minutes were no longer available.

^{2/} See Herbert Sperling Petition of September 3, 1971 attached here to as Appendix A.

^{3/} See Herbert Sperling Plea and Sentence Transcript of November 4, 1971 attached hereto as Appendix B.

Petitioner is presently incarcerated in the Federal penitentiary in Atlanta Georgia following his conviction in 1973 for possession and distribution of narcotics drugs, conspiracy and engaging in a continuing criminal enterprise with respect to narcotic drugs in violation of Title 21, United States Code, Sections 841(b)(1)(A), 812; Title 26, United States Code, Section 4705(a), 7237(b). Petitioner was sentenced on this conviction on September 12, 1973 as a second offender by virtue of his November 4, 1971 conviction. Petitioner, Herbert Sperling, now moves pro se pursuant to Title 28, United States Code, Section 2255 and/or Title 28, United States Code, Section 1651(a) to vacate and set aside his judgment of conviction of November 4, 1971. This memorandum of law is submitted in opposition to that motion.

ARGUMENTPOINT IA JUDGE'S PARTICIPATION
IN PLEA NEGOTIATIONS DOES
NOT PER SE RENDER THAT
PLEA INVOLUNTARY

Petitioner's guilty plea was not coerced by the fact that the court participated in plea negotiations with the petitioner and/or his counsel. We recognize the fact that the 1975 Amendment to Rule 11 expressly prohibits the trial judge's participation in plea discussions. Fed. R. Crim. P. 11(e)(1). This prohibition is underscored by this Circuit's decision in United States v. Werker, 535 F.2d 198 (1976). However, as petitioner points out in his memorandum we are dealing here with Rule 11 as it existed on November 4, 1971, the date of the guilty plea petitioner now seeks to vacate, and as of that date there was no such provision in Rule 11. Furthermore, prior to its decision in Werker, supra, this Circuit had held on more than one occasion that the participation of the trial judge in plea discussions does not in itself render the plea involuntary United States ex rel Rosa v. Follette, 395 F.2d 721, 725 (2d Cir. 1968);

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McGrath v. LaVallee, 348 F.2d 373 (2d Cir. 1965), cert. denied, 383 U.S. 952 (1966). In the final analysis, the Supreme Court mandates that the voluntariness of the plea can be determined only by considering all of the relevant circumstances surrounding it. Brady v. United States, 397 U.S. 742, 749 (1970).

The relevant circumstances surrounding the plea in the instant case were not the usual pre-trial and pre-conviction situation where the accused might legitimately be reluctant to reject a proposition offered by the trial judge who would ultimately conduct his trial and impose sentence. United States ex rel Elknis v. Gilligan, 256 F. Supp., 244, 254 (S.D.N.Y. 1966). On the contrary in this case a rejection of the proposition or "condition" posed by the court did not mean that petitioner would then be faced with going to trial before that same judge. Rather, if petitioner choose not to replead, he could appeal the court's denial of the motion to vacate petitioner's 1959 guilty plea.

Petitioner's contention that the court's making the vacating of the first plea contingent upon a second guilty plea was coercive in nature is a fallacious argument

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in that it rests upon the presupposition that petitioner had an absolute legal right to the vacation of this first plea. An examination of the case law existing at the time petitioner appeared before the district court in 1971 reveals that such was not the case. Until 1970 it was in open question in this Circuit whether ineligibility for parole was a consequence of the plea about which a defendant in a narcotics case must be informed under Rule 11. At that time five circuits had held it was such a consequence Harris v. United States, 426 F.2d 99 (6th Cir. 1970); Jenkins v. United States, 420 F.2d 433 (10th Cir. 1970). Durant v. United States, 410 F.2d 689 (1 Cir. 1969); Berry v. United States, 412 F.2d 189 (3rd Cir. 1969); Munich v. United States, 337 F.2d 356 (9th Cir. 1964). On the other hand two circuits presented a contrary view. Trujillo v. United States, 377 F.2d 266 (5 Cir.) Cert. denied, 389 U.S. 899 (1967); Smith v. United States, 116 U.S. App. D.C. 404, 324 F. 2d 436 (1963), cert. denied, 376 U.S. 957 (1964).

On October 14, 1970 this Circuit held that a defendant pleading guilty to a narcotics offense must be informed by the district court of his ineligibility for parole. Bye v. United States, 435 F.2d 177 (2d Cir. (1970)).

However, the Supreme Court had already held that it's decision in McCarthy v. United States, 394 U.S. 459 (1969), requiring that the defendant whose guilty plea is accepted in violation of prescribed procedure for acceptance of pleas must be afforded an opportunity to plead anew, would not be given retroactive effect. Halliday v. United States, 394 U.S. 831 (1969). Applying the non-retroactivity decision in Halliday, this Circuit held on November 22, 1971 that its Bye decision was not to be applied retroactively to pleas entered prior to October 14, 1970. Korenfeld v. United States, 461 F.2d 770 (2d Cir. 1971). Thus, the holding in Bye, notwithstanding, the court could have properly denied petitioner's motion by following the non-retroactivity reasoning set forth in Halliday. Petitioner would have then had little likelihood of success on appeal in light of the Korenfeld decision handed down by this Circuit shortly thereafter. In reality when the voluntariness of petitioner's new plea is examined in light of these surrounding circumstances instead of the court's "condition" to petitioner representing a coercive threat, it was in fact defendant's only likely source of relief.

An examination of plea voluntariness standards set forth by the Supreme shows that petitioner's 1971 plea meets those standards:

"The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Aeford, 400 U.S. 25, 31 (1970). Clearly in the instant case petitioner had a choice of pursuing his attack on his first plea, an attack that was doomed to failure on the grounds he raised, or repleading and serving a short sentence which would take less time than the appeal of a denial of his motion. Petitioner cannot now be heard to say that his plea was involuntary simply because he felt he had no other choice than to adopt the better of what to him were certainly two unpalatable alternatives. United States ex rel Delman v. Butler, 390 F.Supp. 606 (E.D.N.Y.1975).

Finally, as stated in Brady, supra at p. 755:

"A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court (Emphasis

added), prosecutor or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)", citing Shelton v. United States, 246 F.2d 571, 572 n. 2 (5th Cir. 1957).

Nowhere in the record before us is there any indication that petitioner's plea was induced by "threats", "misrepresentation" or "promises having no proper relation to the prosecutor's business." Id. To constitute fear and coercion on a guilty plea the accused must show that he was subjected to threats or promises of illegitimate action. Ford v. United States, 418 F.2d 855 (8th Cir. 1969). The commitment or promise made by the court in the instant case, albeit inartfully phrased as a "condition," in no way rises to the level of a threat, misrepresentation or promise of illegitimate action.

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POINT TWOTHE DEFECTS IN THE PLEA PROCEEDINGS
WERE NOT SUCH AS TO DEPRIVE THE
PETITIONER OF ANY SUBSTANTIAL RIGHT

It is petitioner's contention that this record of his 1971 plea of guilty is insufficient to establish that the Court properly ascertained that petitioner understood the nature of the charges and that there was a factual basis for the guilty plea. It is the Government's position that, although the case is a difficult one, involving somewhat unique circumstances, the Court in 1971 satisfied the requirements of the then extant Rule 11 of the Federal Rules of Criminal Procedure. ^{4/}

As of that date, Rule 11 read in its pertinent part as follows:

".... The court...shall not accept [a plea of guilty] without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.... The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." Fed.R.Crim. P. 11 [as amended July 1, 1966].

^{4/} We of course recognizes that in United States v. Journet F.2d _____ (2d Cir. slip. op. 300; decided November 1, 1976) the Court of Appeals mandated literal compliance with Rule 11 of the Federal Rules of Criminal Procedure, as amended December 1, 1975. However, we are dealing here with the prior version of Rule 11 as it existed on November 4, 1971 and not the new Rule.

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In McCarthy v. United States, 349 U.S. 459 (1969) the Supreme Court held with regard to this earlier version of Rule 11, that if the trial court accepts a defendant's guilty plea without fully adhering to the procedure set forth in Rule 11, the defendant is entitled to plead anew. Petitioner here claims that the district judge did not inquire of petitioner whether he understood the nature of the charges against him, nor did the judge establish that there was a factual basis for the plea. Therefore, so his argument runs, he should be permitted to replead to the indictment. In McCarthy, the Supreme Court noted, however, that the Rule 11 inquiry "must necessarily vary from case to case", and that it was not establishing "any general guidelines other than those expressed in the Rule itself." McCarthy, supra at pp. 465-467, n.20. In other words, as the Supreme Court put it, "reality" rather than mere "ritual" should control. Id. Subsequent to the McCarthy decision this Circuit has also held that a determination of whether the defendant understood the nature of the charge at the time of entering a plea of guilty must necessarily vary from case to case. Irizarry v. United States, 508 F.2d 960, 965 n.4 (2d Cir. 1975). Clearly what is important with respect to the prior Rule 11 is that instead of requiring the court to follow an

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exact ritual, that there is "substantial compliance" with the spirit and purpose of the Rule. Sappington v. United States, 468 F.2d 1373 (8th Cir. 1972), cert. denied, 411 U.S. 970 (1973). Finally, in the most recent decision dealing with the prior Rule 11, Kloner v. United States, 535 F.2d 730, 733 (2d Cir. 1976) this Circuit stated that:

"....a resulting plea may be upheld as long as the district judge has adequately informed the defendant of the alternative courses of action open to him; [citing North Carolina v. Alford, supra, at p. 31] so that the defendant has not either because of ignorance and misinformation, been misled into entering the plea."

Consequently, it is clear that the record must be viewed in the totality of the surrounding circumstances to determine whether the defendant was "sufficiently aware of the consequences of and alternatives to his guilty plea to render his plea a voluntary and intelligent one." Kloner, supra, at p. 734.

An examination of the "totality of the circumstances" in this case shows clearly that petitioner, represented by able and experienced counsel, was seeking a benefit to which he was not then entitled as the decisional law stood. The "reality" of what occurred in the 1971 proceedings was that in a complex manner designed to avoid the structures of Rule 35 of the Federal Rules of Criminal Procedure petitioner was given a reduction of

his original sentence. When examined in the light of all the circumstances it is unrealistic to attempt to equate those November 4, 1971 proceedings with the usual pre-trial, pre-conviction plea situation.

Petitioner was before the district court in 1971 challenging his earlier 1959 plea of guilty solely on the basis that at the time he had pleaded guilty in 1959 he did not understand the consequences of that plea because he had not been advised that there would be no parole eligibility under the counts to which he was pleading guilty. Petitioner did not challenge the 1959 plea on the basis of a lack of understanding of the nature of the charges. Likewise, he did not challenge the 1959 plea on the premise there was no factual basis for that plea. Indeed, it should be noted that even to the present day there still has been no allegation from petitioner that he did not, infact, understand the nature of the charges to which he pleaded in 1959 and to which he subsequently repleaded in 1971. Nor has there been any allegation that there was not, in fact, a factual basis for these pleas. Accordingly, as the record demonstrates, the district court's emphasis in the 1971 proceeding was on the only aspect of the 1959 plea which then was challenged by petitioner. It is reasonable to conclude

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that if there was no dispute on November 4, 1971 that petitioner understood the nature of the charges to which he had originally pleaded and if there then was also no dispute that there had been a factual basis for that plea, when petitioner repleaded to exactly the same charges in 1971, none of the parties involved believed that the in-depth inquiry required in the usual plea situation was necessary. ^{5/} Such an inquiry would have been to conduct exactly that formalistic ritual condemned by McCarthy as long as there is substantial compliance with Rule 11.

The record of the 1971 plea reveals that the court did substantially comply with Rule 11, although, concededly, there was a failure to conduct an in-depth inquiry. It can be determined from this record that petitioner was repleading to the same seven counts of the seventeen count 1959 indictment to which he had originally pleaded. The court explained that each of these counts involved the possession and sale of narcotics. Moreover, at the time of these proceedings the record shows petitioner's counsel had the prior sentencing minutes. (Appendix B, p. 3). The court then addressed

^{5/} While we do not contend this is the preferred practice, we do not believe that under the circumstances, the procedure was so inadequate as to render the plea of guilty invalid.

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the petitioner directly and inquired whether he wished to plead guilty to those same counts of the 1959 indictment, which he then enumerated. (Appendix B, p. 6). After advising petitioner of his rights to a jury trial, to confront witnesses, to call witnesses in his own behalf and to not incriminate himself, the court specifically asked petitioner if anyone was forcing him to take the plea. Petitioner replied in the negative (Appendix B, pp. 6-7). The fact that there was an agreed upon condition was also placed on the record. Thereafter, petitioner was asked by the court if he was offering his plea voluntarily and with full knowledge of what was happening. Petitioner replied that he was (Appendix A, p. 7). Petitioner was informed he was not eligible for parole, and although the court did not state the maximum sentence to which petitioner could be sentenced, it is clear from the record and petitioner's own affidavit, that he was fully aware of the exact sentence that the court intended to impose, a sentence which in fact was immediately thereafter imposed. The court also established that petitioner understood the nature of the charges to which he was pleading guilty and that there was a factual basis for the plea by personally asking petitioner to explain in his own words to what he was pleading guilty.

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Petitioner replied that he was pleading guilty to "conspiracy and sale to violate the narcotics laws." (Appendix A, p. 9). After some fencing with the court, petitioner admitted that the narcotic involved was heroin.

It must be recalled that these 1971 proceedings that we have just outlined were initiated by petitioner's affidavit and motion papers wherein he himself referred to the charges to which he had previously pleaded guilty. (Appendix A). It is somewhat disingenuous for petitioner to urge at this late date that his second plea must be vacated because of the court's failure to explicitly outline the charges, when it is demonstrated by petitioner's 1971 motion papers that he understood the nature of the 1959 charges. ^{6/}

6/ It should be noted at this point that petitioner was convicted of a subsequent violation of the federal narcotics laws in 1973 and sentenced to a term of life imprisonment. This conviction was affirmed on appeal. United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962, 421 U.S. 949 (1975). It appears that petitioner found no fault with his 1971 conviction until 1976, five years after the events in question. While the doctrine of "laches" is inapplicable to a §2255 motion, Heflin v. United States, 358 U.S. 415 (1959), the timeliness of petitioner's belated application, we believe, is a factor to be considered. Certainly, the "lapse of time effects the good faith and credibility of this petitioner." Rake v. United States, 231 F.Supp. 813, 817 (W.D. Va., 1964); See also United States v. Monte, 169 F.Supp. 671, 673 (E.D.N.Y. 1959).

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Finally, when consideration is given to the reason behind the McCarthy requirement for a factual basis for the plea being in the record, i.e. protecting a defendant from voluntarily pleading guilty to charges of which he is innocent, McCarthy, supra at p. 467, the responses given by petitioner concerning his guilt were adequate. Petitioner does not suggest that he had repleaded to charges of which he was innocent; nor, was there any reason for the court to have believed that this was even remotely the case. And this is especially so where there was before the court a defendant who was repleading to exactly the same charges to which he had previously pleaded.

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CONCLUSION

For the foregoing reasons the instant motion should be denied.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

MARILYN GAINEY
Assistant United States Attorney
(Of Counsel).

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HERBERT SPERLING,
Petitioner,
-against-
UNITED STATES OF AMERICA,
Respondent.

(T.C.P.)

Petitioner does not wish to burden this honorable court with enumerating all of the governments error's , so only a glaring few will be shown as follows;

a. At various pages throughout their brief the government suggest that only at specific times periods is due process applicable, and that at other time periods due process may be ignored.

b. On pages 6 & 7 of their brief the government trys unsuccessfully to juggle dates and confuse this court and the issue presented. From the governments own brief it is abundantly clear that this petitioner was entitled to a vacature of my 1959 plea under Bye. Also quite clearly the court in 1971 felt this way also because in fact my 1959 plea was vacated. Since this petitioner and the court are not gifted with seeing into the future, and the korenfeld decision on retroactivity did not come down from this circuit untill some 18 days later. Bye was the law at the time of my vacature. Petitioner would like to point out now that at that time the government never appealed the courts actions in my case under the interviewing law dectrine.

c. Since on page 11 the government claims that "reality" rather than "ritual" should prevail and since the record clearly shows that I stated clearly in open court that I did not even remember what kind of narcotic was involved, the reality is that my plea should never have been accepted. The coercion is clear, I had served almost my complete sentence lacking (4) months, the condition imposed by the court was that if I did not plead guilty anew and accept "time served plus 4 months," my motion would be denied and I would be forced to serve out the 4 remaining months while appealing.

d. On pages 13 & 17 of the governments brief they state that at no time did I claim I was innocent. This honorable court should take notice of petitioners affidavit of 1971, (par.12) attached to the governments brief where I stated that I did not feel that I was guilty of the crimes alleged in the indictment and that the government had insufficient evidence to support the facts alleged.

e. Because of this affidavit and my statement on the record that I did not know the type of narcotic involved an indepth inquiry was clearly called for.

f. At no time did the court determine that I understood legally the nature of the exact charges against me.¹

(6) The paramount issue before this court is whether or not this petitioner was coerced into accepting a plea. Logic clearly shows petitioner was, I had served almost my entire sentence, the prospect of continued incarceration after all that time was more oppressive than words can express. Reasonably, the conviction was an accommodation to the court, and not something that must ever be considered legally sufficient.

(7) The case authority supplied by the government to support its position must be disregarded in that none of the cases cited deals with the unique ingredients of my fact pattern: The plea was previously vacated; the vacature of the original plea of guilty was affected eleven years later on a ten year sentence; I asked for and was ready for a trial; The court recognized that the original plea of guilty should be vacated; The court refused to vacate my original conviction unless there was a prior stipulation that I would immediately plead guilty.

(8) The government pontificates that merely because the judge took an active role in the plea bargain is not in and of itself a conclusion of involuntariness. This is correct hornbook law, and exception was never taken to the mere involvement of the court, but rather to specific and particularized areas of the judges involvement to the effect that there was ^{NO} a plea bargain whatsoever, just fiat. There is no issue as to whether I was allowed to withdraw my plea and plead anew by a specific mandate of the court, improvident then and unsubstantial now.¹

(9) The plea was clearly involuntary not only because the court intruded in the plea, but because of precisely what the court did by that intrusion. Petitioner has showed that the plea was involuntary on its face, coerced, and only benefited the court and the government.

(10) That I was and I am seriously prejudiced by the maintenance of conviction derived from the plea. No way does "Latches" apply here as there is a "continuing wrong."

(11) The government fails to offer any proof that petitioners claims are

untrue through affidavits from judge Constantino or the U.S. attorney at that time. While conceding to error at several places in their opposition, the governments only real argument is that all the errors are harmless.

C O N C L U S I O N

Petitioner prays the court will for the foregoing reasons grant him the relief sought herein, together with the injunction sought in the order to show cause, attached hereto and made a part hereof.

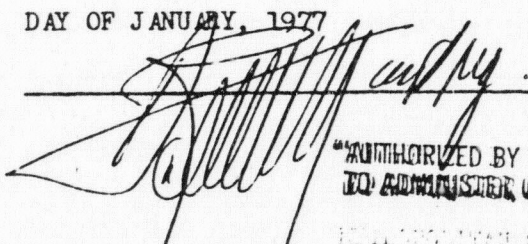
Respectfully submitted

By Herbert Sperling

Herbert Sperling
78271
M.C.C. 150 Park Row
New York, N.Y. 10007

^R
SWORN TO BEFORE ME THIS 23RD

DAY OF JANUARY, 1977



"AUTHORIZED BY THE ACT OF JULY 7, 1955
TO ADMINISTER OATHS (18 U.S.C. 4004)".

FEDERAL CORRECTIONAL CENTER
150 PARK ROW
NEW YORK, NEW YORK 10007

TO: David G. Trager
U.S. Attorney
Eastern District Of New York
225 Cadman Plaza East
Brooklyn, New York 11201

ATTENTION: Marilyn Gainey, Esq.
Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- -x
HERBERT SPERLING,

Petitioner,

-against-

UNITED STATES OF AMERICA, .

Respondent.
----- -x

76 C 1991

MEMORANDUM AND
ORDER

February 4 , 1977

PLATT, D.J.

Petitioner has filed, pro se, a motion to vacate, set aside, or correct a sentence imposed upon him by the Honorable Mark A. Costantino. Title 28 U.S.C. § 2255.

On September 22, 1959, petitioner pled guilty before the Honorable Joseph C. Zavatt to violations of the Federal Narcotics Laws, Title 21 U.S.C. § 173, § 174, and on February 19, 1960, he was sentenced to a term of ten years imprisonment by the Honorable Matthew Abruzzo. On September 3, 1971, petitioner moved to vacate the 1959 conviction and sentence alleging that he was not informed at the time of his plea of his ineligibility for parole. The application came before the Honorable Mark A. Costantino who, on November 4, 1971, pursuant to an apparent agreement made between the prosecutor, defendant and his counsel to which the Court was made privy, vacated the prior plea. The petitioner then under such agreement pled guilty to the same crimes and was sentenced to "time served plus four months." In 1973, after the petitioner had been released from jail, he was again convicted of narcotics

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violations and was sentenced on September 12, 1973, as a second felony offender by virtue of his November 4, 1971, plea. Petitioner now moves to vacate the November 4, 1971, plea and to expunge the first conviction from his record arguing that: (i) Judge Costantino improperly interjected himself into the plea and sentence discussion and made his decision to vacate the 1959 guilty plea on the "condition" that the petitioner plead guilty to the same crimes thus coercing him into pleading guilty; and (ii) Judge Costantino failed to ascertain whether the petitioner understood the nature of the charges and whether there was a factual basis for the plea.

I

Although the petitioner is not in custody pursuant to the 1971 plea and sentence, this Court does have jurisdiction to consider this application. United States v. Morgan, 346 U.S. 502 (1954).

II

We recognize initially that the 1975 Amendment to Rule 11 expressly prohibits a trial Judge's participation in plea discussions. Federal Rules of Criminal Procedure Rule 11(e)(1). However, we are dealing here with Rule 11 as it existed on November 4, 1971, the date of the guilty plea that the petitioner seeks to vacate herein. As of that date, Rule 11 contained no such provision. Furthermore, the Second Circuit had held on several occasions prior to that date

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that the participation of a trial judge in plea discussions did not in itself render the plea involuntary. U.S. ex rel. Rosa v. Follette, 395 F.2d 721, 725 (2d Cir.), cert. denied, 393 U.S. 892 (1968); McGrath v. LaVallee, 348 F.2d 373 (2d Cir. 1965), cert. denied, 383 U.S. 952 (1966).

Similarly, with respect to the petitioner's coercion argument we note that his decision to plead guilty may well have been a voluntary and intelligent choice among the alternative courses of action. North Carolina v. Alford, 400 U.S. 25 (1970). He was presented with the option of pursuing his attack on the first plea to a higher court, which might have taken months and resulted in less favorable treatment than he received, or repleading and serving a shortened sentence. Thus, we are sympathetic to the respondent's claim that the petitioner should not now be heard to say that his plea was involuntary simply because he chose the better of two unpalatable alternatives. See U.S. ex rel. Delman v. Butler, 390 F.Supp. 606 (E.D.N.Y. 1975).

Moreover, we find a more fatal flaw in the petitioner's argument. He alleges that the agreement entered into between the Court, the prosecutor and his attorney "coerced" him into pleading guilty. If this argument be taken as true, then the petitioner may not enjoy the benefits of that agreement without bearing its burdens. Thus, the Court may abrogate the entire agreement in much the same manner as it would any agreement based on coercion, restore the petitioner to the status quo ante, and consider anew the petitioner's original contention that at the time of his

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1959 plea the Court erred in failing to inform him of his ineligibility for parole. Viewed another way, we may consider whether the alleged errors prejudiced the petitioner, or were harmless beyond a reasonable doubt. Cf. Chapman v. California, 386 U.S. 18 (1967); Milton v. Wainwright, 407 U.S. 371 (1972); United States ex rel. Ross v. LaVallee, 448 F.2d 552 (2d Cir. 1971).

Turning then to the merits of the petitioner's original claim, we note that on October 14, 1970, the Second Circuit held that a defendant who pleads guilty to a narcotics violation must be informed of his ineligibility for parole by the Court. Bye v. United States, 435 F.2d 177 (2d Cir. 1970). However, on November 22, 1971, the Court held that the Bye decision would not be applied retroactively to pleas entered prior to October 14, 1970. Korenfeld v. United States, 451 F.2d 770 (2d Cir. 1971), cert. denied, 406 U.S. 975 (1972). The petitioner's argument that he was entitled to be informed in 1959 of his ineligibility for parole is thus meritless and the actions of Judge Costantino in vacating the prior plea and sentencing the petitioner to time served plus four months were harmless beyond a reasonable doubt since the petitioner served no more than the original ten year sentence.

III

Our resolution of the first issue makes it unnecessary for us to consider the petitioner's second argument.

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5.

For the foregoing reasons, petitioner's application to vacate, correct, or set aside his 1971 guilty plea must be, and the same hereby is, denied.

Thomas C. Bell

U.S.D.J.

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X
4 HERBERT SPERLING, .
5 Petitioner, .

76 C 1991
NOTICE OF MOTION FOR
REARGUMENT

6 ~~-against-~~ .

7 UNITED STATES OF AMERICA, .
8 Respondent, .
9 -----X

10 Notice is hereby given that upon the annexed affidavit the petitioner
11 Herbert Sperling will move this court before the Honorable Thomas C. Platt, Jr.
12 United States District Judge, for an order reconsidering and granting the
13 petitioners motion under 2255 title 28, to vacate and set aside his plea of
14 guilty and sentence under 71-C-1241, as being a violation of Rule 11, F.R.C.P.,
15 and Due Process.

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20 Dated: NEW YORK, NEW YORK

21 February 10, 1977
22

23
24 By Herbert Sperling
Herbert Sperling, Pro-Se

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HERBERT SPERLING,
Petitioner,

A F F I D A V I T

IN SUPPORT OF MOTION
FOR RECONSIDERATION

-against-

UNITED STATES OF AMERICA,
Respondent.

STATE OF NEW YORK ;
:SS
COUNTY OF NEW YORK:

PRELIMINARY STATEMENT

I, Herbert Sperling, first being duly sworn according to law depose and say:

On February 4, 1977 this Honorable Court filed an opinion denying this petitioners motion to vacate and set aside his guilty plea and sentence in 71-C-1 241, as being in violation of Rule 11, F.R.C.P., and Due Process of law. The petitioner respectfully request that this court reconsider its decision of February 4, 1977 in view of the clear record in this matter and in view of the legal posture and unanswered issues in which this matter now rest.

First, petitioner must apologize to this Honorable Court because of his inability to have made crystal clear the issues presented in this case. Petitioner is Pro-Se, and as such unlearned in the law and unskilled in briefing his argument as clearly and consisely as he would wish. This being the case petitioner respectfully requests this Honorable Court to construe liberally all of his contentions.

Petitioner's claims are simply as follows:

(1) The plea of guilty in 71-C-1
241 was coerced and involuntary and the product of fear, confusion and improper
pressures placed on petitioner by the court imposing a (condition) having no
proper relationship to the instant plea in violation of Rule 11, F.R.C.P..

(2) When Petitioner was sentenced to the 71-C-1241, (1971) plea, petitioner was once again deprived of the right to be notified of the elements of

1 the crime for which petitioner plead guilty. Therefore, that sentence which
2 clearly violates the U.S. v. Bye, mandate is what I bring before this Honorable
3 Court for resalution.

4 (3) Petitioner's (1959) plea is RES JUDICATA, and legally no longer
5 exists and is in fact (never existed legally, once it was set aside). No proper
6 and timely appeal was ever made by the government and the time has long since
7 passed when any arguements on the (1959) issues may be properly entertained.

8 On page three of this Honorable Courts opinion, the court states that if
9 petitioners contentions are true about coercion than the court may abrogate the
10 entire agreement based on the coercion and restore the petitioner to the STATUS
11 QUO ANTE and go all the way back to (1959). Petitioner fails to understand this,
12 the STATUS QUO, in law would be only that the petitioners plea and sentence of (19-
13 71) would be void and he must be made to plead anew, or, be granted a new trial.
14 In both fact and law petitioner gained absolutly no benefits and only accrued harm
15 from his (1971) plea. Predecated on this 1971 conviction, petitioner is presently
16 serving an increased sentence of 30 years. Only the government received benefits
17 here, not the petitioner. It is hornbook law that a plea of guilty must be
18 voluntary. The condition placed on this petitioner by the court removed all
19 possibility of voluntaryness.

20 In the present situation if this petitioner did not accept the courts
21 condition he would have been forced to serve out the remainder of a sentence
22 which was based upon a plea which was illegal by the courts own finding and
23 under the Bye decision which was the law of this circuit at the time. Petitioners
24 contention is and always have been that Judge Constantino's ruling the plea being
25 illegal on the 1959 issue in 1971 was correct and this petitioner fails to under-
26 stand the government arguing it now, or this court questing or relying on it now.

27 The second issue raised by this petitioner and at least partially
28 conceded by the government at verious parts of its response, but not even
29 discussed in this courts opinion are reversabile error by themselves. Clearly
30 from the plea and sentencing minutes themselves this petitioners contentions are
31 correct . To again summerize them; the court in 1971 never established a factual
32 basis for accepting a plea of guilty from this petitioner, in fact, a reading of

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1 the record if anything establishes this petitioner's innocence of the charges and
2 not his guilt. Petitioner did not even know what kind of narcotics were involved
3 and the court had to tell him. The court never inquired as to any underlying acts
4 of petitioner which would constitute a substantive violation under the indictment.
5 The court in (1971) never told the petitioner any of the elements of the crimes
6 charged, therefore, petitioner could not have plead guilty to the charges that
7 were alleged, knowingly and intellegently and in fact, has not up to this present
8 day. The sentence imposed ny the court, "time served, plus, four months" was and
9 is illegal by statute. The couft had no sentencing alternatives, it had imposed a
10 minimum of five years by statute. Therefore, this petitioners sentence is and was
11 clearly outside the statute and illegal, furthermore, petitioner was never inform-
12 ed of the sentencing limits that must be imposed ny statute. This petitioner cannot
13 understand this courts failure to rule or even discuss the real issue and
14 respectfully request that this Honorable Court now make a finding of fact and
15 conclusions of law on these issues.

16 C O N C L U S I O N

17 On account of all of the foregoing and adopting herein all of my original
18 arguement, the petitioner respectfully contends that this Honorable Court erred in
19 its decision of February 4, 1977 denying this petitioners motion to set aside and
20 vacate his plea and sentence of 1971. Petitioner respectfully requests this
21 Honorable Court to reconsider petitioners numerous contentions of error, and to
22 grant this petitioner the relief sought, and to whatever else he is entitled to
23 under law.

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25 Respectfully Submitted

26 By Herbert Sperling
27 Herbert Sperling, Pro-Se
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State of New York)
County of New York) ss

I, HERBERT SPERLING, being first duly sworn under my oath depose and say that I have subscribed to the foregoing petition, that I know the contents thereof; and that the matters and allegations therein set forth are true.

Herbert Sperling
Signature of Affiant

SUBSCRIBED AND SWORN to before me this 10th day of
February, 1977.

[Signature]
Notary Public

My commission expires:

"AUTHORIZED BY THE ACT OF JULY 7, 1953
TO ADMINISTER OATHS (18 U.S.C. 4004)".

METROPOLITAN CORRECTIONAL CENTER
150 PARK ROW
NEW YORK, NEW YORK 10007

(month) (day) (year)

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
HERBERT SPERLING,

Petitioner,

76 C 1991

-against-

UNITED STATES OF AMERICA,

SUPPLEMENTAL MEM-
ORANDUM AND ORDER

Respondent.
-----x

February 28 , 1977

PLATT, D.J.

On February 4, 1977, this Court denied petitioner Herbert Sperling's motion to vacate, set aside, or correct a sentence imposed upon him by the Honorable Mark A. Costantino. Title 28 U.S.C. §2255.

Petitioner has moved for reargument of the petition. That motion is granted and the Court, on reconsideration of its decision, adheres to it.

SO ORDERED.

Thomas C. Platt

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
HERBERT SPERLING

Petitioner, :

THOMAS C. PLATT

-against- :

76 C 1791

UNITED STATES OF AMERICA :

NOTICE OF APPEAL

Respondent. :
-----X

N O T I C E is hereby given that the above-named defendant appeals to the UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT from the SUPPLEMENTAL MEMORANDUM AND ORDER filed February 28, 1977, denying petitioner Herbert Sperling's motion pursuant to the provisions of 28 U.S.C. 2255 to vacate, set aside, or correct a Judgment and Sentence imposed upon him by the Honorable Mark A. Constantino on November 4th, 1971 in that a

- a) The plea of guilty was involuntarily made,
- b) The plea of guilty was inconsistent with Rule 11 (e) of the Federal Rules of Criminal Procedure.

DATED: March 22, 1977

HERBERT SPERLING, Pro se
78271-158

ATLANTA PENITENTIARY (FED)
ATLANTA GA. 30315

DAVID TRAEGER
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
FOLEY SQUARE, NEW YORK 10007

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